85-910

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SAMUEL WHITEHEAD,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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November, 1985

Merrill/Chicago • 372-2800

QUESTION PRESENTED

Whether petitioner's substantive federal rights were denied by the Kentucky Courts which relied on Kentucky law and refused to follow federal law in 1. instructing the jury on damages and burden of proof based on *Kentucky Instructions to Juries*, 2. refusing to instruct the jury on the issues of assumption of the risk and *res ipsa loquitur*, and 3. overemphasizing petitioner's conduct with the result that the jury found him 90% contributorily negligent.

TABLE OF CONTENTS

	PAGE
Reference to Reports	1
Jurisdiction	1
Statutory Provision for Jurisdiction	2
Statutes Involved	2
Statement of Facts	3
How the Federal Questions Were Presented	6
Argument	7
Conclusion	14
Appendices	
Opinion of the Court of Appeals of Kentucky	A-1
Order of the Supreme Court of Kentucky denying Motion for Discretionary Review	A-7
Instructions to the Jury	A-8
Petitioner's Requested Instructions	A-16
Excerpts from the Transcript of Evidence	A-21

TABLE OF CITATIONS

Cases

	PAGE
Brady v *Southern Ry. Co.*, 320 U.S. 476, 64 S. Ct. 232 (1943)	13
Brown v *Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105 (1949)	13
Central Vermont R. Co. v *White*, 238 U.S. 507, 35 S. Ct. 865 (1915)	11, 12, 13
Cox v *Cooper, Ky.*, 510 SW2d 530(1974)	6, 7, 9
Dixon v *Penn Central Company*, 481 F2d 833, 837 (1973)	12
Dugas v *Kansas City Southern Railway Lines*, (5th Circuit) 473 F. 2d 821 (1973) Cert. denied 414 U.S. 823	13
Jesionowski v *Boston & Maine Railroad Company*, 329 U.S. 452, 67 S. Ct. 401 (1946)	9
Kansas City Southern Railway Company v *Justis*, 5th Cir., 232 F. 2d 267 (1956); Cert. denied, 352 U.S. 833	9
Norfolk & Western Railway Co. v *Liepelt*, 444 U.S. 490, 62 L.Ed. 2d 689, 100 S. Ct. 755 (1980)	9
St. Louis Southwestern Railway Company v *Dickerson* 470 U.S. , 84 L. Ed. 2d 303, 105 S. Ct. 1347 (1985)	7, 9, 13
Tiller v *Atlantic Coast Line R. Co.*, 318 U.S. 54, 58, 63 S. Ct. 444 (1943)	10

Statutes Involved

28 U.S.C. §1257 (3)	2
45 U.S.C. §51	2
45 U.S.C. §54	3, 10

Miscellaneous

Devitt & Blackmar Federal Jury Practice and Instructions 3rd Ed. (1977)	7
Palmore, Kentucky Instructions to Juries, Vol. 2 (1977)	6, 7, 9, 12

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REFERENCE TO REPORTS

The opinion of the Court of Appeals of Kentucky is appended hereto at A-1 through A-6. The Order denying Motion for Discretionary Review of the Supreme Court of Kentucky appears at pages A-7.

JURISDICTION

The judgment of the Court of Appeals of Kentucky affirming the judgement of the Trial Court entered on December 5, 1983 was entered on May 3, 1985. Petitioner's timely Motion for Discretionary Review was denied by the Supreme Court of Kentucky on August 28, 1985 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISION FOR JURISDICTION

62 Stat. 929, as amended 28 U.S.C. §1257(3)

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3.) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

STATUTES INVOLVED

35 Stat. 66, as amended, 45 U.S.C. §51.

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in

part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

35 Stat. 66, as amended 45 U.S.C. §54.

Assumption of Risks of Employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

STATEMENT OF FACTS

Petitioner, a resident of Danville, Kentucky, is a black conductor-trainman who on November 29, 1976 had worked for the respondent for more than eight years. At the time of trial in October of 1983, he was 41 years of age with a wife and ten children. (T.E., Vol. III, pp. 332-333)

On November 29, 1976 he was assigned as conductor on a train of 127 cars running between Danville, Kentucky and Oakdale, Tennessee. (T.E. Vol. III, pp. 342-348). He rode at the end of the train in a metal caboose with a wood floor and seats or benches on both sides. There were iron bars used as handholds next to the seats and coal box. It was equipped with a coal burning stove which required manual fueling. (T.E. Vol. III, pp. 347-350)

The caboose was not equipped with cushioned draw bars which would have absorbed most of the slack action. Cabooses owned by other railroads and occasionally used on respondent's line had cushioned draw bars as do respondent's cars which haul fragile commodities. Slack is the distance between knuckles or couplers which may be a little more or less than four inches. Going down hill the cars' knuckles or couplers all push together and the slack runs in; going up hill the knuckles or couplers all pull apart the four inches, more or less, and the slack runs out.[1] (T.E. Vol. III, pp. 352-353)

Petitioner testified that the occurrence which brought about his injury happened in the following manner.

> "A. Well, as we went through — went into Cedar Grove there, which would be about Milepost 164, which as you come out of Woods, slack would go in on your train, go on by Woods and into Eljhu as usual, there's a little dip, it would come out there; as you turned over into Eljhu the rear end of your train would run back in. And at this position, this is where I thought it would be safe to get up and put coal in the stove, because this you have to do at some point or other and all you have to do is figure out where would be the safest for you to do it. And, I got up the put coal in the stove and the slack came out and jerked me down and hurt my back. And, at this place it shouldn't have been a slack in the train whatsoever, one way or the other. The cab shouldn't have had a run-in and it shouldn't have had a run-out, neither one." (T.E., Vol. III, pp. 350-351)

and further

> "Slack came out and it's — it just came out hard, it's the hardest slack that I believe I've ever encountered as a conductor on the railroad, and it jerked — it was

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[1] There is more than 42 feet of slack in a train of 127 cars.

hard enough that it jerked my hand loose from the bar and jerked me down." (T.E. Vol. III, p. 355)

That there was unusual and violent slack action at the time and place of petitioner's fall was confirmed by the flagman who was the only other person in the caboose. (T.E. Vol. III, pp. 421-422; 437-441)

The locomotive engineer had exclusive control of the speed and braking of the train. Petitioner had no control over length of the train, the placement of cars in it or the track or terrain over which it operated. (T.E. Vol. III, pp. 345-347)

Respondent contended through three witnesses and photographs that petitioner was not in a proper place at the time he was injured. (T.E. Vol. V, pp. 744-746; 767-768. T.E. Vol. VI pp. 819-820; 829. T.E. Vol. VI pp. 845-854) Respondent introduced no rule, bulletin or any other directive requiring its employees on the caboose to be seated at all times.

Petitioner underwent low back surgery performed by two different doctors on January 20, 1977, (T.E. Vol. III, pp. 376-377) July 26, 1978 (T.E. Vol. IV, p. 614; Goldman deposition of 10-2-81 p. 15) and May 27, 1979 (T.E. Vol. IV, p. 614; Goldman deposition of 10-2-81 p. 26). In the opinion of Dr. Goldman, petitioner is permanently disabled from his occupation of Conductor-Trainman. (T.E. Vol. IV, p. 614; Goldman deposition of 10-2-81 pp. 39-41) Respondent offered no evidence to refute this opinion. Petitioner also testified that he had been unable to find any employment of a lighter nature. (T.E. Vo. III, pp. 404-405) Respondent offered no evidence to refute this contention either.

The evidence showed that from the date of the accident to the date of trial, petitioner had lost $204,143.00 in net wages and fringe benefits (T.E. Vol. IV pp. 599-608) and $4,959.00 in out-of-pocket medical expenses. (T.E. Vol. IV, pp. 629-630)

Dr. James Altman an economics expert testified that the present value of petitioners future wage loss is $512,837.00,

the present value of lost fringe benefits is $184,621.00 and that $66,186.00 had to be added to compensate for future taxes (T.E. Vol. V, pp. 609-610). Respondent offered no economic evidence to refute these figures.

Petitioner tendered a comprehensive set of jury instructions to the court, all of which were rejected as not being in conformity with Kentucky law. Instead, the court gave its own instructions based upon 2 J. Palmore *Kentucky Instructions to Juries* (T.E. Vol.VII, pp. 895, 900, 901, 908, 909)

The jury returned a verdict for petitioner and awarded him $204,143 for lost wages and $4,959 for out of pocket medical expenses but then reduced these amounts by 90%, that being the extent to which it found petitioner contributorily negligent. It awarded no amount whatsoever to compensate petitioner for pain and suffering or future wage loss.

Judgment in the amount of $20,910.20 was entered on December 5, 1983.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Petitioner asserted its position on the federal claim at every level of the Kentucky court system.

On November 2, 1983, petitioner tendered 22 Jury Instructions based on federal law to the Trial Court which were received and made a part of the official record (T.E. Vol. III, p. 895) Over petitioner's objection (T.E. Vol. VII, p. 900-901, A-22) the Trial Court gave its own instructions based on 2 J. Palmore *Kentucky Instructions to Juries*, and rejected all of Petitioner's tendered instructions.

Petitioner raised the federal question in his brief and upon oral argument to the Court of Appeals. The Court of Appeals decided the federal question on the basis of *Cox* v *Cooper* 510 SW 2d 530 (1974) and principles set forth in 2 J. Palmore *Kentucky Instructions to Juries*.

Petitioner filed a timely Motion for Discretionary Review in the Supreme Court of Kentucky, which was denied without opinion on August 28, 1985. Thus the Court of Appeals of Kentucky is the "highest court in [the] state in which a decision could be had". 28U.S.C. §1257

ARGUMENT

Petitioner tendered to the Trial Court twenty-two proposed jury instructions which fairly and accurately stated the federal law as applied to FELA cases. Most of them, and all of the ones in controversy here, can be found in Devitt & Blackmar *Federal Jury Practice and Instructions* 3rd Ed., a widely used form book, adopted by many federal district courts.

The Trial Court summarily rejected all of the tendered instructions as being violative of the rule in *Cox* v *Cooper*, Ky., 510 SW2d 530(1974) that instructions shall provide only the "bare bones" for guidance of the jury. The Court of Appeals in affirming the action of the Trial Court in this case cited the *Cox* case with approval.[2]

In lieu of the tendered instructions the trial court formulated instructions based on 2 Palmore *Kentucky Instructions to Juries*. These instructions are set forth in their entirety at A-8 through A-15. This form book does not purport to contain any instructions for use in FELA cases.

Damages Instructions

This Court has repeatedly held, most recently in *St. Louis Southwestern Railway Company* v *Dickenson*, 470 U.S. , 84 L. Ed. 2d 303, 105 S.Ct. 1347 (1985) that " . . . it is settled that the propriety of jury instructions concerning

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[2] At the time *Cox* v *Cooper* supra was decided the Court of Appeals of Kentucky was the highest appellate court in the Commonwealth. Justice Palmore who wrote the opinion is also the author of *Kentucky Instructions to Juries* used by the Trial Court to instruct the jury in this case and cited with approval by the Court of Appeals in the decision being appealed.

the measure of damages in an FELA action is an issue of "substance" determined by federal law".

Here the Trial Court told the jury "You *may* award damages for *any or all* of the following . . . " emphasis supplied. (A-10) The jury followed the instruction literally and awarded damages only for lost income and medical expenses to the date of the trial and awarded absolutely nothing for pain and suffering, past or future, or future wage loss even though there was competent evidence to support these elements of damage and no evidence offered by respondent to refute them.

In contrast, petitioner's tendered instructions numbers 20, 21 & 22 (A-19 through A-21) would have guided the jury as to the factors it should have considered on each element. The "any or all" approach used by the Trial Court obviously confused the jury to such an extent that it failed to award anything for pain and suffering to a man who had been violently knocked down, had invasive diagnostic tests, three major back operations, and wears a back brace to this day.

Petitioner was entitled to receive compensation for *all* of the elements of damage on which there was competent unrefuted proof and it was reversible error for the court not to so instruct the jury, Kentucky common law to the contrary, notwithstanding.

The orthopaedic surgeon who performed petitioner's last two back operations testified that he was permanently disabled from his former occupation and petitioner testified as to his unsuccessful attempts to find alternate employment. Respondent offered absolutely no evidence that Dr. Goldman's opinion was unfounded or erroneous or that there was alternate work which was available to petitioner. The jury ignored this evidence but did comply with the "any or all" instruction given by the Trial Court.

We submit there can be no basis in reason or logic for the jury's failure to award damages for pain and suffering and future wage loss. The only explanation for its contradictory

verdict is that it was confused by a legally insufficient and erroneous statement of the law.

Just as this Court has previously insisted that other damage instructions conform to federal standards, *Norfolk & Western Railway Co.* v. *Liepelt*, 444 U.S. 490, 62 L.Ed. 2d 689, 100 S.Ct. 755 (1980), *St. Louis Southwestern Railway Company* v *Dickerson* 470 U.S. , 84 L. Ed. 2d 303, 105 S.Ct. 1347 (1985) it should now do the same for a seriously injured railroad trainman whose congressionally created rights have been denied him by Kentucky procedure.

Petitioners rights were further denied him by the trial court's insistance that only "bare bones" instructions can be given in Kentucky under the holding of Cox v *Cooper, supra.*

Res Ipsa Loquitor Instruction.

One of petitioner's major theories of liability was the doctrine of *res ipsa loquitur*. The evidence was uncontradicted that petitioner had no control over the train's acceleration or braking system, the make up or length of the train, or the track and terrain over which it operated. Inasmuch as slack action, of the magnitude which caused petitioner to break his firm grasp on the iron bar and be thrown to the floor was not ordinary and does not occur in the absence of negligence, he tendered a "*res ipsa*" instruction as is proper under the holding in *Kansas City Southern Railway Company* v *Justis*, 5th Cir., 232 F. 2d 267 (1956); Cert. denied, 352 U.S. 833. This Court stated its reasons for approving the use of "*res ipsa*" jury instructions in FELA cases in *Jesionowski* v *Boston & Maine Railroad Company*, 329 U.S. 452, 67 S. Ct. 401 (1946). In the face of these controlling decisions the Court of Appeals of Kentucky holds that it is not a proper instruction because "it is never proper to instruct the jury as to presumption of fact or law" citing 2 J. Palmore *Kentucky Instructions to Juries*, Section 13.11(g)(1977). Aside from the fact that this Court has held on numerous occasions that state jury instructions must give way to federal substantive law, *St. Louis Southwestern Railway Co.* v *Dickerson*, supra, and

the cases cited therein, petitioner's tendered Instruction No. 17 (A-18) did not instruct the jury to presume respondent's negligence, but did say that the jury could infer such negligence if it found that petitioner had established exclusivity of control in respondent and that the slack action was sudden, unexpected and extraordinary.

Both petitioner and the only other man on the caboose at the time of the occurrence testified that the slack action which knocked petitioner to the floor was not the normal slack usually encountered but was unexpected and exceptionally severe. Totally disregarding this evidence, petitioner's lack of operational control, and the federal substantive law, the Trial Court excluded this theory of negligence from its instructions.

Assumption of the Risk Instruction

Petitioner's Instruction No. 11 (A-16) sought to instruct the jury in the language of the statute that assumption of the risk is not a defense available to respondent under the FELA. This Court in *Tiller* v *Atlantic Coast Line R. Co.*, 318 U.S. 54, 58, 63 S. Ct. 444 (1943), held "that every vestige of the doctrine of assumption of the risk was obliterated from the law" by 45 USC §54.

While respondent's defense may have been couched in terms of contributory negligence, in reality it was a classic presentation of the assumption of the risk defense. The respondent introduced no rules, regulations or safety bulletins requiring its employees on moving cabooses to remain seated, yet the jury was allowed to consider pictures and lengthy testimony of three witnesses relating to how petitioner should have been riding. (A-23 through A-26) None of these witnesses were even on the caboose at the time of the occurrence so they had no actual knowledge of the conditions as they then existed. The impact of their testimony, however, was that petitioner assumed the risk of his injury by the act of leaving his seat irrespective of his subsequent action to pro-

tect himself while fueling the stove, by firmly holding onto the iron safety bar installed there for that very purpose.

The fact that petitioner waited for the slack to run in, along with his knowledge that the caboose was now running downgrade and would continue to do so because of a 25 mph slow order for a period of time sufficient for him to put coal in the stove, made it reasonable for him to leave his seat when he did. Excessive slack action is always a man made condition resulting from some fellow employee's negligence, the risk of which cannot be assumed by another employee under the FELA. There was not one shred of proof that petitioner had anything to do with causing the violent slack action that knocked him down.

Petitioner's Instruction No. 11 would have placed these factors in proper perspective for the jury and the Trial Court's failure to give it had an obvious impact on the jury's verdict.

Burden Of Proof Instruction — Contributory Negligence

The Trial Court's error in refusing to give petitioner's Instruction No. 11 was compounded by its refusal to give petitioner's Instruction No. 13 (A-17) a simple, straight forward Burden of Proof Instruction. The Trial Court's instructions were silent on this standard even though both negligence and contributory negligence were at issue. The jury was never told that respondent had to prove that petitioner was contributorily negligent. Only seven years after Congress passed the FELA, the Supreme Court held that an instruction on burden of proof was a matter of federal law. *Central Vermont Railway Company* v *White*, 238 U.S. 507, 35 S. Ct. 865, 867, 868 (1915). In the case at bar, the jury was allowed to speculate that petitioner bore the burden of proving respondent's negligence and his own freedom from contributory negligence. There was nothing in the Court's instructions to indicate otherwise. The Court's instruction told the jury that it was the duty of petitioner to exercise ordinary care for his own safety and that his "failure" to do so

constituted contributory negligence. (A-9) Further, the instruction did not tell the jury that the burden is met by evidence showing that what is sought to be proved is more likely true than not true, i.e., by a preponderance of the evidence.

Without such guidelines the jury may well have thought that petitioner bore the burden of proving his freedom from contributory negligence, perhaps beyond a reasonable doubt. While neither the Trial Court nor respondent would contend that this is the law, *Dixon* v. *Penn Central Company*, 481 F2d 833, 837 (1973) the jury had no way of knowing who had to prove what or by how much evidence when it was instructed only in the nebulus, undefined concept that it was to be " . . . . . *satisfied* from the evidence that *he failed* to observe this duty". (emphasis supplied)

The only arguable evidence of any contributory negligence by petitioner was that he left his seat to put coal in the stove at a time and place he thought was not dangerous. There was evidence of respondent's negligence in that the caboose was not equipped with cushioned drawbars or an oil stove which would not require manual fueling.

Ignoring this Court's decision in *Central Vermont Railway Co.* v *White*, supra, the Court of Appeals of Kentucky approved the Trial Court's refusal to instruct on burden of proof again citing 2 J. Palmore Kentucky *Instructions to Juries* §13.11 wherein it states that . . . "[instructions] should never specifically inform the jury that one party or the other has the burden of proof, or that his evidence must "preponderate" in order for him to be entitled to a verdict".

Under these inapplicable state standards the jury found petitioner nine times as negligent as respondent. We submit that the only possible explanation for this patently unfounded result is the lack of jury instructions clearly setting forth the federal standards.

In summary, both the Trial Court and the Court of Appeals of Kentucky have allowed state procedure to deny

petitioner his federally created substantive rights. This Court has repeatedly held that the uniform application of the federal act in state and federal courts is mandatory. *Brown* v *Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105 (1949); *Brady* v *Southern Ry. Co.*, 320 U.S. 476, 64 S. Ct. 232(1943); *Central Vermont R. Co.* v *White*, 238 U.S. 507, 35 S. Ct. 865 (1915). Petitioner was entitled to have his case decided by a properly instructed jury. The FELA "creates federal rights protected by federal law and that as to the propriety of jury instructions federal decisions are controlling". *Dugas* v *Kansas City Southern Railway Lines*, (5th Circuit) 473 F. 2d 821 (1973) Cert. denied 414 U.S. 823.

Under the erroneous instructions of the trial court, the petitioner was effectively deprived of his federal rights and was denied a fair trial. This constitutes reversible error under this Court's holding in *St. Louis Southwestern Railway Co.* v *Dickerson*, supra, and, therefore, we submit, petitioner is entitled to a new trial.

CONCLUSION

For the reasons set forth above we submit that this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 84-CA-1054-MR
and
No. 84-CA-2600-MR

Court of Appeals

COMMONWEALTH OF KENTUCKY

SAMUEL E. WHITEHEAD
Appellant/Cross-Appellee
v.
SOUTHERN RAILWAY COMPANY
Appellee/Cross-Appellant

Appeal from Jefferson Circuit Court
Action No. 79-CI-10368
Honorable Kenneth Corey, *Judge*

Cross-Appeal

OPINION RENDERED: May 3, 1985; 10:00 a.m.
NOT TO BE PUBLISHED

AFFIRMING ON APPEAL

AFFIRMING ON CROSS-APPEAL

BEFORE: COMBS, DUNN and MILLER, Judges.

MILLER, JUDGE. This is an appeal and cross-appeal from a judgment entered upon a jury verdict in an action under the Federal Employers' Liability Act (FELA) [45 U.S.C. §§51-60 (1982)] and Federal Safety Appliance and Equipment Act [45 U.S.C. §§1-43 (1982)]. The action was filed on November 5, 1979. Judgment was entered on December 5, 1983.

On November 29, 1976, appellant/Samuel E. Whitehead (Whitehead) was a conductor on Southern Railway Company's (Southern) 127-car freight train on a run between

Danville, Kentucky, and Oakdale, Tennessee. He had been a trainman for Southern since 1968, and a conductor since 1970.[1] He had made the run some 300 times per year for many years. On November 29, 1976, Whitehead stood up in the caboose to stoke a coal stove and was jostled from his feet by the "slack action" of the train as it traversed a grade in the roadbed.[2] The train was operating at approximately 25 miles per hour, pursuant to a "slow order" issued because of track conditions. Whitehead injured his back which resulted in three back operations. He brought this suit for damages. The jury was instructed to consider damages for medical expenses (past and future), lost wages (to date of trial), pain and suffering (past and future), and impairment of power to labor and earn money after the date of trial (permanent injury). The jury returned a verdict for medical expenses and lost wages, but specifically denied damages for pain and suffering and permanent injury. The jury further apportioned negligence between Whitehead and Southern at 90% on the former and 10% on the latter.

On this appeal, Whitehead asserts (1) error in refusing to permit introduction of certain answers given by Southern to interrogatories; (2) error in the jury's failure to return a verdict for pain and suffering and permanent injury; and (3) error in failing to render instructions tendered by plaintiff. Southern cross-appeals, claiming it was free of negligence.

We first consider the claims on Whitehead's appeal. There is no error in refusing introduction of answers to interrogatories. During trial, three of Southern's witnesses testi-

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1. As conductor, Whitehead was in overall charge of the train. He rode in the caboose and had communication with the operating crew in the engine.

2. Basically, "slack" is the distance between the knuckles or couplers which may be a little more or less than four inches. Going down hill, the cars (knuckles or couplers) all push together and the slack "runs in;" going up a hill, the knuckles or couplers all pull apart the four inches, more or less, and the slack "runs out." It is a common characteristic of railroading.

fied that Whitehead acted improperly in standing up to attend the stove at the time and place and while the train was in motion. In rebuttal, Whitehead sought to introduce Southern's answer to interrogatory number 31 to the effect that it did not claim Whitehead was violating any rule at the time of his injury. The interrogatory provides in relevant part as follows:

> "State whether defendant claims any violation by the plaintiff of any rule . . . "
>
> Answer: No.

Any error emanating from the trial court's refusal to admit the answer to interrogatory 31 in rebuttal was harmless. CR 61.01. As we read the record, Southern's contention was not that plaintiff violated any safety rules promulgated by the railroad, thereby contributing to his own injury, but rather that he violated a common sense rule known to all railroadmen. We find no deception in Southern's answer nor do we perceive that the jury was shortchanged in not being able to consider same.

As to the jury's failure to return a verdict for pain and suffering and for permanent injury, we find no basis for review. The verdict may be considered inconsistent in that a verdict was given for medical expenses without a corresponding award for pain and suffering. *Cf. American States Insurance Company* v. *Audubon Country Club*, Ky., 650 S.W.2d 252 (1983). However, we believe the rule in *Stucker* v. *Bibble*, Ky., 442 S.W.2d 578 (1969), is still the law in this jurisdiction. The *Stucker* rule requires that the inconsistency arising from the failure of a jury to award other damages in addition to medical expenses is waived unless brought to the attention of the trial court before discharge of the jury. There was no such request in the case at hand. Further, we observe that it was stated in *Audubon Country Club*, *supra*, at 254, (albeit waiver was not an issue) that a jury need only "address the

question and give some answer." In this regard, we note that form verdict number I provided in relevant part as follows:

VERDICT NO. I

We, the Jury, find for the Plaintiff, Samuel L. Whitehead, and award him damages against the Defendant, Southern Railway Company, as follows:

Medical expenses	s/ 4,959.00
Lost Wages	s/204,143.00
Pain and Suffering	s/ -0-
Impairment of his Power to Labor and Earn Money	s/ -0-
TOTAL AWARD	s/209,102.00

s/ John H. Flodstrom

FOREMAN

It is clear the jury did, in fact, address the questions of pain and suffering and permanent injury, pursuant to the instructions, and manifested their consideration in the form verdict by inserting a zero rather than leaving the space blank. We are further convinced from the voluminous record that the jury was well within it prerogative in denying an award for permanent injury and for *future* pain and suffering. The evidence simply compels a contrary result. Therefore, the only serious question is failure to award a sum for pain and suffering to date of trial — a matter we deem waived. *See Stucker, supra.*

Finally, appellant's contention that the instructions tendered by the court were erroneous and that his own tendered instructions should have been given is without merit. We have carefully examined both sets of instructions and cannot conclude that a rendering of plaintiff's instructions would have

likely changed the result. We find no significant difference in the instructions given and those proffered.

If there is a significant difference in the instruction, it lies in the fact that the instruction required the jury only to "believe from the evidence" or "be satisfied from the evidence," in order to find for appellant rather than find that the evidence preponderated in his favor. We believe that such an instruction was more favorable to appellant. In any event, this jurisdiction does not recognize the preponderance rule. 2 J. Palmore, *Kentucky Instruction to Juries*, §§13.09 — 13.11 (1977).

Further, appellant complains that the jury should have been instructed upon the presumption arising under *res ipsa loquitor*. So far as we know, it is never proper to instruct the jury as to presumption of fact or law. 2 J. Palmore, *Kentucky Instructions to Juries*, §13.11[g] (1977).

Finally, at oral argument, appellant strongly complained of the trial court's refusal to render his "standard" set of instructions which he contended were tailored by the federal judiciary in FELA cases. It is our belief that instructions are essentially matters of procedure. They do not determine what substantive rights a citizen has, but rather are a guide in judicially acquiring those rights. In FELA cases, the procedural rules of the state are applicable to actions brought in state court. *See St. Louis Southwestern Railway Company* v. *Dickerson*, U.S. , 105 S. Ct. 1347 (1985) (holding, however, that an instruction as to the amount of recovery is a matter of substantive law and therefore not subject to state procedural rules). The instructions rendered fairly comported with the requirement of this jurisdiction that instructions shall provide only the "bare bones" for guidance of the jury with the right of counsel to flesh-out in closing argument. *See Cox* v. *Cooper*, Ky., 510 S.W.2d 530 (1974).

In considering Southern's cross-appeal, we find the same without merit. There was ample evidence to create a submis-

sible issue as to Southern's negligence under the Acts sued upon.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed on appeal and cross-appeal.

ALL CONCUR

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85-SC-445-D
(84-CA-1054-MR & 84-CA-2600-MR)

Supreme Court of Kentucky

JEFFERSON CIRCUIT COURT
#79-CI-10368

SAMUEL WHITEHEAD

Movant

v.

SOUTHERN RAILWAY COMPANY

Respondent

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of movant for a review of the decision of the Court of Appeals is denied.

ENTERED August 28, 1985.

s/ Robert F. Stephens
Chief Justice

No. 79CI10368

Jefferson Circuit Court

NINTH DIVISION
JUDGE KEN G. COREY

SAMUEL L. WHITEHEAD

Plaintiff

v.

SOUTHERN RAILWAY COMPANY

Defendant

INSTRUCTIONS TO THE JURY

The Court instructs the Jury as follows:

1. It was the duty of the Defendant, Southern Railway Company, (hereinafter referred to as Southern), acting through its officers, agents, and employees, to exercise ordinary care to provide the Plaintiff, Samuel L. Whitehead (hereinafter referred to as Whitehead), with a reasonably safe and suitable place in which to work, and reasonably safe and suitable equipment, including the caboose about which you have heard evidence.

If you are satisfied from the evidence that the Defendant, Southern, its officers, agents, or employees, failed to observe this duty and that such failure, if any, caused in whole or in part the injury to the Plaintiff, Whitehead, then your verdict will be in favor of the Plaintiff, Whitehead, against the Defendant, Southern. If the Jury finds for the Plaintiff under this Instruction, you are instructed to utilize Verdict Form I.

But unless you so believe, then you shall return a verdict for the Defendant, Southern. If the Jury finds for the Defendant, you are to utilize Verdict Form III.

2. It was the duty of the Plaintiff, Whitehead, on the occasion concerning which you have heard evidence, to exercise ordinary care for his own safety. If the Jury is satisfied from the evidence that he failed to observe this duty, and that such failure, if any, caused or contributed to cause and bring about the accident and his resulting injuries, then the Plaintiff, Whitehead, was guilty of contributory negligence and you will so find.

3. Whenever an employee of a railroad is injured while engaged in the course of his employment, and the injury was caused in whole or in part from the negligence of any of the officers, agents, or other employees of the railroad, then the railroad shall be liable in damages to the injured employee. Therefore, if you find that the Plaintiff, Whitehead, is guilty of contributory negligence, as set forth in Instruction #2 above such contributory negligence does not defeat or bar his recovery altogether, but the damages as hereinafter set forth shall be diminished by the jury in proportion to the amount of negligence attributable to him. If the Jury finds the Plaintiff Whitehead to have been contributorily negligent it shall determine the percentage of such negligence and diminish any award to him by such percentage, and utilize Verdict Forms I and II.

4. If you believe from the evidence that the Plaintiff, Whitehead, was negligent in that he violated the duty imposed upon him by Instruction #2, and that such failure, if any there was upon his part, was the sole cause of his accident and resulting injury, then you shall return a verdict for the Defendant Southern. If you so find, you shall utilize Verdict Form III.

5. If the jury finds for the Plaintiff, Whitehead, you will award him such sum in damages that will fairly and reasonably compensate him for such of the following damages as you believe from the evidence that he has sustained directly by reason of the accident. However, you should not allow him any compensation for any affliction which he has which did

not directly result from the injury he claims to have received from the occurences referred to in this case.

You are further instructed that if you find that the Plaintiff exercised reasonable care in selecting a physician or surgeon, he may recover damages to the full extent of the injury sustained, even though the physician or surgeon does not use the most approved remedy or the best means of cure, or fails to exercise the degree of care and skill which any other physician or surgeon might have exercised. You may award damages for any or all of the following:

a. for such pain and suffering, mental and physical, which he has endured and which you may believe from the evidence it is reasonably certain he will endure in the future.

b. for such permanent impairment of his power to labor and earn money as you may believe from the evidence he is reasonably certain to lose on or after November 2, 1983.

c. Any award under (b) above must be reduced to its present cash value and adequate allowance must be made for the earning power of money, and future earnings should be calculated on the length of time the Plaintiff would expect to be employed rather than on the time he would expect to live. You are entitled to consider on the one hand, all factors or circumstances such as illness, retirement either compulsory or voluntary, the nature and hazards of the employment of the Plaintiff, accidents, the possibility of obtaining other suitable employment, death, or other like matters which might tend to decrease the loss; on the other hand, you are entitled to consider such further factors as aptitude, industriousness, possibility of promotion, increase in wages and other like matters which might lead to increase the loss.

d. For such sum in damages as you believe from the evidence will fairly and reasonably compensate the Plaintiff for the loss of wages or income that he was caused to lose from the date of the accident, November

29, 1976, to date, not to exceed on this account the sum of $204,143.00, the amount claimed by the Plaintiff.

e. For such in damages as you believe from the evidence will fairly and reasonably compensate him for reasonable medical expenses both in the past and in the future, not to exceed $4,959.00, as you believe from the evidence he sustained directly by reason of the injury.

Your whole award is not to exceed the sum of $1,000,000.00, the amount claimed by the Plaintiff in his complaint.

6. If you find for the Defendant, Southern, you will say so by your verdict and no more.

7. You are further instructed that your award to the Plaintiff, Whitehead, if any, will not be subject to any income taxes and you should not consider any such taxes in fixing the amount of your award.

8. "Negligence" is the failure to exercise ordinary care.

"Ordinary care" as applied to the Defendant, Southern, is that degree of care customarily exercised by ordinarily careful and prudent railroads under circumstances like or similar to those concerning which you have heard evidence.

"Ordinary care" as applied to the Plaintiff, Whitehead, means that degree of care which ordinarily reasonable and prudent conductors would exercise under circumstances like or similar to those concerning which you have heard evidence.

9. Nine or more of you may make a verdict. If less than twelve agree upon a verdict, all who agree thereto will sign it. However, if your verdict is unanimous, only your Foreman, whom you yourselves will choose, need sign it.

s/ KEN G. COREY

KEN G. COREY, JUDGE

VERDICT NO. I

We, the Jury, find for the Plaintiff, Samuel L. Whitehead, and award him damages against the Defendant, Southern Railway Company, as follows:

Medical expenses	$ 4,959.00
Lost Wages	204,143.00
Pain and Suffering	—0—
Impairment of his Power to Labor and Earn Money	—0—
TOTAL AWARD	209,102.00

s/ John H. Flodstrom
FOREMAN

Members of the Jury if not unanimous:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

VERDICT NO. II

We, the Jury, find under Instruction Number 3 that the Defendant violated its duty owed to the Plaintiff, and further that the Plaintiff was contributorily negligent with reference to the November 29, 1976 accident.

Pursuant to Instruction Number 3, we find the total damages sustained by the Plaintiff to be as follows:

Medical expenses	$ 4,959.00
Lost Wages	204,143.00
Pain and Suffering	—0—
Impairment of his Power to Labor and Earn Money	—0—
TOTAL AWARD	209,102.00

FOREMAN

We further find that the Plaintiff was contributorily negligent to the extent of 90% and therefore reduce the Plaintiff's damages by such percentage.

_____

FOREMAN

*Members of the Jury if not unanimous:

s/ _____	s/ _____
s/ _____	s/ _____
s/ _____	s/ _____
s/ _____	s/ _____
s/ _____	_____
s/ _____	_____

* *The signatures of 10 of the 12 jurors appear on the original verdict form.*

VERDICT NO. III

We, the Jury, find for the Defendant, Southern Railway Company, and award the Plaintiff, Samuel L. Whitehead, nothing.

_____

FOREMAN

Members of the Jury if not unanimous:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 11

Section 4 of the Federal Employers' Liability Act (45 U.S.C.A. § 54) provides in part that:

> "In any action brought against any common carrier . . . to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

If the plaintiff's injury is caused or contributed to by the negligent act or omission of a fellow employee, acting in the course of his employment, then the defendant employer would be responsible for the act or omission of the fellow employee.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.11

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 13

Although the burden is on the party, who asserts the affirmative of an issue to prove his claim by a preponderance of the evidence in the case, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 71.13

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 17

If you find, however, (1) that the injury to the Plaintiff was caused by a sudden, unexpected and extraordinary slack action in the movement of the train, (2) that at the time of the accident the operation of the train and the track upon which it was running were solely under the management, operation and control of and in the exclusive possession of the defendant; and (3) that in the normal course of events the accident and ensuing injury would not have occurred without the negligence of those having the management, operation, and control and exclusive possession of the train and track upon which it was running, then you may find that the accident and ensuing injury were caused by the negligence of the defendant.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 80.08

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 20

If you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award, you should include:

(1) the reasonable value, not exceeding the actual cost to the plaintiff, of any examinations, attention and care by physicians and surgeons and others shown by the evidence in the case to have been reasonably required and actually given in the treatment of the plaintiff;

(2) also the reasonable value, not exceeding the actual cost to the plaintiff, of any hospital accommodations and care, services of nurses or attendants, ambulance service, x-ray pictures, medicine and other supplies, if any, shown by the evidence in the case to have been reasonably required and actually used in the treatment of the plaintiff.

(3) also any reasonable and necessary expense to the plaintiff for medical, surgical, hospital and other services and care and supplies, which you find from the evidence in the case are reasonably certain to be required in future treatment of the plaintiff as a result of the injury in question.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 85.03

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 21

If you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you should include:

(1) The reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by the plaintiff since the injury, because of being unable to pursue his occupation, as a result of the injury. In determining this amount, you should consider any evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost, had he not been disabled.

(2) Also such sum as will reasonably compensate the plaintiff for any loss of future earning power caused by the injury in question, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future. In determining this amount, you should consider what plaintiff's health, physical ability and earning power were before the accident and what they are now; the nature and extent of his injuries, whether or not they are reasonably certain to be permanent; or if not permanent, the extent of their duration; all to the end of determining, first, the effect, if any, of his injury upon his future earning capacity, and, second, the present value of any loss of future earning power, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future, as a result of the injury in question.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 85.04

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 22

If you should find that the plaintiff is entitled to a verdict, you will award him a sum which will compensate him reasonably for (1) any pain, suffering and mental anguish already suffered by him and resulting from the injury in question; and (2) for any pain, suffering and mental anguish, which you find from the evidence in the case that he is reasonably certain to suffer in the future from the same cause.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 85.05

EXCERPTS FROM THE TRANSCRIPT OF EVIDENCE
NOVEMBER 2, 1983

(WHEREUPON, the following was heard before the jury entered the courtroom.)

THE COURT: Now, we can go on the record. Copy of the Plaintiff's tendered instructions including the proposed instructions that were tendered this morning, which, I assume, you received a copy of?

MR. GREENWELL: I just received it this morning, Your Honor.

THE COURT: And copy of the Defendant's proposed instructions.

(WHEREUPON, Plaintiff's Requested Jury Instructions and Defendant's Proposed Jury Instructions were received into evidence and have made a part of the official record hereof.)

THE COURT: Okay. Mr. VanBree and/or Mr. Hastings?

MR. VanBREE: Yes, Your Honor. Of course, we strenuously object to the Court's failure to give our requested instructions as tendered. Specifically . . .

THE COURT: You mean that booklet you gave me?

MR. VanBREE: Yes, Your Honor. I think that even though it comes from the Federal Book of Devitt and Blackmar, I think it is an accurate and fair statement of law and we would be entitled to have those instructions given.

EXCERPTS FROM THE TESTIMONY OF LOCOMOTIVE ENGINEER, TALMADGE GLEN SHEWMAKER

Q. What do trainmen working on the railroad do in the ordinary course of their everyday work to protect themselves from slack action?

A. Set in their seat and be braced.

Q. Now, specifically with regard to a conductor like Mr. Whitehead was on November 29, 1976, where should he be seated, sir?

A. In the seats provided for him.

Q. And where are those seats located?

A. In the caboose.

Q. At what part of the caboose in relationship to the . . .

A. Well, they're about in the center of the caboose with a bay window where you can observe your train.

Q. Okay. Now, when a conductor is on that caboose while the train is moving or whoever is on the caboose while the train is moving, what are their duties with respect to the train?

A. They're to sit in that seat and watch their train, set forward in the seat and watch the train for hot box or whatever, anything that would be out of normal to the train.

Q. And you've ridden on a caboose many or few times?

A. Many.

Q. And in order to watch the train while it's in movement and perform the duties of a conductor, is thee any place other than the seat of the bay window that the conductor should be?

A. No, sir.

Q. Sir, what about a new employee that comes on with the railroad? Now, Mr. Whitehead had been there some eight and a half years, but what about a new employee? What, if anything, is he instructed on with respect to moving trains?

A. Well, normally, he'd be instructed by an older employee. When they go to work on the railroad, why, you're kind of like it's on-the-job training program and you work under someone else and they explain to you what you should and shouldn't do.

Q. What's the first thing that a man would learn when he goes on a train that's making a run from Danville to Oakdale, Tennessee?

A. It would be to be seated at all times when the train is moving.

Q. Mr. Shewmaker, I want you to assume the following facts to be true that have been testified to. On the night of November 29, 1976 southbound train from Danville to Oakdale, Tennessee is approaching Cedar Grove Kentucky; the conductor or Mr. Raines, one or the other, from the caboose calls you and says, 'We have a "slow order" at Cedar Grove'; thereafter the conductor feels the train slowing down, "slow order" calls for twenty-five miles per hour and the train is slowing down to approximately twenty-five miles an hour as you're approaching or nearing or possibly already into the "slow order" at the head end of the train. Assuming all of those facts to be true, sir, where would you normally expect the conductor and persons in the caboose to be at that time?

A. I'd expect them to be sitting in their seats.

EXCERPTS FROM THE TESTIMONY OF LOCOMOTIVE ENGINEER ROBERT E. MOORE

Q. If you were the conductor in Mr. Whitehead's position what in the ordinary, customary way of doing things on the railroad would you do while you're riding in a caboose going through that area?

A. I'd be sitting in my observation seat with my feet braced.

Q. Okay. Now, with respect to the conductor's job while a train is doing, where is he supposed to be to perform his job?

A. Supposed to be in his seat observing torque (sic, foreward) of the train.

Q. Okay. Sir, would you tell the jury where the safest place on the caboose is at a time when the train is experiencing slack action?

A. Well, the safest place would be in the seat.

Q. In the seat where the windows are?

A. In the caboose. Yes, in the observation seat.

EXCERPTS FROM THE TESTIMONY OF GENERAL ROAD FOREMAN OF ENGINES, JACKSON SHERMAN ANDERSON

Q. And would you tell us what the pictures are depicting you doing?

A. Sitting in a proper position in a caboose expecting slack action and normal riding.

Q. Okay. And there is what has been identified as Defendant's Exhibit I4 and that is another view, I take it, of the — well, you tell them what it is a view of.

A. This is a view, it doesn't show the same thing. It shows me looking forward, braced and holding on, expecting slack action.

Q. Okay. And I show you now what's been marked as Defendant's Exhibit H3 and ask you if that is the observation position?

A. This is the normal position while a train is in motion observing the train through the little mirror — or window on the side, look around curves or look up the side of the train as you go along, but you're holding on.

Q. Now, I'll show you what's marked as Defendant's Exhibit G2 and ask you if you will explain what that is.

A. This is the position where you're riding when you're not expecting slack. Your feet are braced, you're not holding on, you're not expecting any slack in that position.